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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 JOSUE SOTO *et al.*,  
11 Plaintiffs,  
12 v.  
13 DIAKON LOGISTICS (DELAWARE),  
14 INC.,  
15 Defendant.  
16

Civil No. 08cv33-L(WMC)

**ORDER (1) DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; AND (2) DENYING DEFENDANT'S EX PARTE APPLICATION FOR SUPPLEMENTAL BRIEFING**

17 This putative class action claiming violation of California wages and hours laws was  
18 brought by three truck drivers working for Defendant. Plaintiffs filed a motion for class  
19 certification pursuant to Federal Rule of Civil Procedure 23. Defendant filed an opposition and  
20 Plaintiffs replied. In addition, Defendant filed an ex parte application for supplemental briefing.  
21 For the reasons which follow, Plaintiffs' motion for class certification is **DENIED WITHOUT**  
22 **PREJUDICE**. Defendant's ex parte application for supplemental briefing is **DENIED** as moot.  
23 The parties are **REFERRED** to the Magistrate Judge to resolve their discovery issues and set  
24 case management dates consistent with this order.

25 Defendant Diakon Logistics (Delaware), Inc. provides home delivery services to various  
26 furniture and appliance retailers. Plaintiffs Josue Soto, Ghazi Rashid and Mohamed Abdelfattah  
27 are truck drivers who worked for Defendant in California. They claim they were classified by  
28 Defendant as independent contractors when they were in fact non-exempt employees.

1 Mr. Soto filed a putative class action complaint in state court seeking recovery from  
2 Defendant for failure to pay minimum wages, provide proper meal and rest periods, reimburse  
3 for reasonable business expenses, issue itemized wage statements and for other alleged  
4 violations of the California Labor Code provisions. He also alleged that Defendant violated  
5 California Business and Professions Code Sections 17200 *et seq.* He requested damages and  
6 injunctive relief. Defendant removed the action to this court pursuant to 28 U.S.C. § 1441 based  
7 on diversity jurisdiction under 28 U.S.C. Section 1332(a)(1) and (d)(2). Subsequently, the  
8 complaint was amended to add the remaining two Plaintiffs.

9 Plaintiffs' initial motion for class certification was denied without prejudice. (*See* Order  
10 (1) Denying Plaintiffs' Motion for Class Certification Without Prejudice; and (2) Denying  
11 Defendant's Ex Parte Application for Supplemental Briefing, filed August 30, 2010 ("Order").)  
12 Subsequently, the parties conducted discovery and Plaintiffs renewed their motion.

13 "The class action is an exception to the usual rule that litigation is conducted by and on  
14 behalf of the individual named parties only. In order to justify a departure from that rule, a class  
15 representative must be part of the class and possess the same interest and suffer the same injury  
16 as the class members." *Wal-Mart Stores, Inc. v. Dukes*, \_\_ U.S. \_\_, 131 S.Ct. 2541, 2550 (2011)  
17 ("*Dukes*") (internal quotation marks and citations omitted). In this regard, Rule 23 contains two  
18 sets of class certification requirements set forth in Rule 23(a) and (b). *United Steel, Paper &*  
19 *Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips*  
20 *Co.*, 593 F.3d 802, 806 (9th Cir. 2010) ("*United Steel*"). "The party seeking class certification  
21 bears the burden of demonstrating that the[se] requirements . . . are met." *Id.* at 807.

22 "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class  
23 whose claims they wish to litigate. The Rule's four requirements – numerosity, commonality,  
24 typicality, and adequate representation – effectively limit the class claims to those fairly  
25 encompassed by the named plaintiff's claims." *Dukes*, 131 S.Ct. at 2550-51 (internal quotation  
26 marks and citations omitted). As noted in the Order, Plaintiffs met the numerosity, commonality  
27 and typicality requirements of Rule 23(a), but were given leave to make a proper showing that  
28 they also meet the adequate representation requirement. (Order at 3-4.)

1 “Where a putative class satisfies all four requirements of Rule 23(a), it must still meet at  
 2 least one of the three additional requirements outlined in Rule 23(b) in order to be eligible for  
 3 certification.” *United Steel*, 593 F.3d at 806. Plaintiffs seek certification under Rule 23(b)(3)  
 4 (See Pls’ Mot at 7), which provides:

5 A class action may be maintained if Rule 23(a) is satisfied and if:

6 . . .

7 (3) the court finds that the questions of law or fact common to class members  
 8 predominate over any questions affecting only individual members, and that a  
 9 class action is superior to other available methods for fairly and efficiently  
 10 adjudicating the controversy. The matters pertinent to these findings include:

11 (A) the class members' interests in individually controlling the prosecution or  
 12 defense of separate actions;

13 (B) the extent and nature of any litigation concerning the controversy already  
 14 begun by or against class members;

15 (C) the desirability or undesirability of concentrating the litigation of the claims in  
 16 the particular forum; and

17 (D) the likely difficulties in managing a class action.

18 Defendant argued in opposition to Plaintiffs’ initial motion, as it does now, that a class cannot be  
 19 certified under Rule 23(b)(3) because the questions of law or fact common to class members do  
 20 not predominate over the questions affecting individual members. “The predominance inquiry  
 21 focuses on the relationship between the common and individual issues and tests whether the  
 22 proposed class [is] sufficiently cohesive to warrant adjudication by representation.” *Vinole v.*  
 23 *Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (internal quotation marks,  
 24 footnote and citation omitted).

25 Rule 23(b)(3)'s predominance and superiority requirements were added to cover  
 26 cases in which a class action would achieve economies of time, effort, and  
 27 expense, and promote uniformity of decision as to persons similarly situated,  
 28 without sacrificing procedural fairness or bringing about other undesirable results.  
 Accordingly, a central concern of the Rule 23(b)(3) predominance test is whether  
 adjudication of common issues will help achieve judicial economy.

29 *Id.* (ellipsis, internal quotation marks and citations omitted). Plaintiffs’ initial motion was denied  
 30 in large part because they failed to sufficiently address and make a proper showing under Rule  
 31 23(b)(3). (Order at 8-10.)

1 Plaintiffs sought to certify a class defined as

2 All persons presently and formerly employed by Defendant in the State of  
3 California between December 5, 2003 and the present as delivery personnel during  
4 the Class Period who were subject to the “Service Agreement” (or similar  
document), which categorized them as independent contractors and not employees.

5 Plaintiffs’ action is premised on the claim that they and the putative class members were  
6 misclassified by Defendant as independent contractors, when they should have been classified as  
7 non-exempt employees. If Plaintiffs are correct that they were erroneously treated as  
8 independent contractors, then the case can proceed to determine whether their rights under  
9 California wages and hours laws were violated. The Service Agreement, which each Plaintiff  
10 and putative class member signed in substantially the same form, provided that the contracting  
11 party was Defendant’s independent contractor.<sup>1</sup> California Labor Code does not define the terms  
12 “employee” and “independent contractor” for purposes of the claims asserted by Plaintiffs. *See*  
13 *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 10 (2007). The relevant  
14 determination is made based on a fact intensive analysis:

15 The essence of the test is the “control of details” – that is, whether the principal  
16 has the right to control the manner and means by which the worker accomplishes  
17 the work – but there are a number of additional factors in the modern equation,  
18 including (1) whether the worker is engaged in a distinct occupation or business,  
19 (2) whether, considering the kind of occupation and locality, the work is usually  
20 done under the principal's direction or by a specialist without supervision, (3) the  
skill required, (4) whether the principal or worker supplies the instrumentalities,  
tools, and place of work, (5) the length of time for which the services are to be  
performed, (6) the method of payment, whether by time or by job, (7) whether the  
work is part of the principal's regular business, and (8) whether the parties believe  
they are creating an employer-employee relationship.

21 *Id.*, citing *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal.3d 341, 350-51 (1989),  
22 among others. A contract such as the Service Agreement, which designates a party as an  
23 independent contractor, does not necessarily negate a finding of an employment relationship.  
24 *See Estrada*, 154 Cal. App. 4th at 10; *see also Borello*, 48 Cal.3d at 349 (1989) (“label placed by  
25 the parties on their relationship is not dispositive”).

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27 <sup>1</sup> It is undisputed that although the Service Agreements were revised by Defendant  
28 during the proposed class period, they were substantially the same in the matters pertinent to  
class certification.

1 Defendant argued in opposition to Plaintiffs' initial motion, as it does now, that a class  
2 cannot be certified because the factors relevant to the employment analysis cannot be established  
3 on a class-wide basis. Plaintiffs' initial motion was denied largely because Defendant presented  
4 evidence that the drivers were free to, and in some instances did, operate multiple trucks with  
5 multiple delivery teams, and in some instances did not personally perform any deliveries at all.  
6 (Order at 8.) Because the evidence was relevant to the employment analysis, the extent of this  
7 practice was relevant in deciding whether "adjudication of common issues will help achieve  
8 judicial economy." (*Id.*, quoting *Vinole*, 571 F.3d at 944.) Defendant also presented other  
9 evidence that suggested that the putative class was fragmented in other respects. (*See id.* at 9.)  
10 Based on the record before the court, it was unclear whether the employment factors could be  
11 considered on a class-wide basis so as to meet predominance and superiority requirements of  
12 Rule 23(b)(3). (*Id.*; *see also id.* at 8.)

13 Although Plaintiffs' motion was denied, Plaintiffs were given an opportunity to renew the  
14 motion with appropriate evidentiary support. They were admonished that if they chose to "file  
15 another motion for class certification, they must address the issue of the prevalence among the  
16 putative class members of drivers operating multiple trucks and not personally performing  
17 delivery services, and to what extent such individuals should be included in the proposed  
18 definition of the class." (Order at 8-9.) The parties were further instructed to "focus their  
19 evidence on the factors relevant to the employment analysis and address the issues (1) whether  
20 and to what extent the factors can be addressed on a class-wide basis; (2) whether dividing the  
21 putative class into subclasses would remedy any shortcomings; and (3) whether any groups of  
22 individuals should be excluded from the proposed class definition." (*Id.* at 9.) In addition, the  
23 court admonished Plaintiffs that they had to address Rule 23(b)(3)(B) though (D). (*Id.* at 9-10.)

24 In their new motion, Plaintiffs did not adequately address the issues highlighted in the  
25 Order. With respect to the main issue, that the putative class appeared to be fragmented because  
26 some class members operated more than one truck with multiple delivery teams and that some  
27 did not personally perform delivery services at all, Plaintiffs amended the proposed class  
28 definition to read:

1 All persons who performed work for Diakon Logistics (Delaware) Inc. as an  
2 owner/operator in the State of California between December 5, 2003 and the  
3 present subject to the "Service Agreement" characterizing them as an independent  
contractor, with the exception of any such person who operated more than one  
delivery vehicle for Defendant during this period.

4 (Pl.'s Mot. at 2.)

5 In addition to not addressing the issues identified by the court, Plaintiffs did not make any  
6 showing or argument why the new class definition should be considered. Furthermore, it raises  
7 new issues of its own. For example, Plaintiffs do not contend that the showing on Rule 23(a)  
8 factors they made with respect to the old definition automatically applies to the new definition.  
9 Another issue raised by the new definition is that it does not appear to be limited to Defendant's  
10 employees. For these reasons alone, the new class definition cannot be considered.

11 More importantly, Plaintiffs did not discuss the change in the definition or argued how it  
12 addresses the issues raised by the court. Instead, they attempted to make their Rule 23(b)(3)  
13 showing by arguing that the employment factors can be addressed on a class-wide basis because  
14 all persons who signed the Service Agreement were treated the same. Based on the Service  
15 Agreement, Defendant's advertising (Pls' Exh. A & R), the deposition testimony of Defendant's  
16 President (*id.* Exh. B) and his affidavit (Decl. of Charles H. Johnson), Plaintiffs may well be able  
17 to show that all who signed the Service Agreement were treated by Defendant in the same way.  
18 However, this does not address the fragmented nature of the putative class. Defendant's  
19 evidence shows that the putative class breaks down along many different categories. (*See* Def.'s  
20 Exh. B.) Plaintiffs' new evidence, legal argument and class definition have not negated this and  
21 Plaintiffs have not suggested any ways in which the court should address the various groups of  
22 putative class members. The fragmentation of the putative class undoubtedly will present case  
23 management issues, if a class were to be certified. *See* Fed. R. Civ. Proc. 23(b)(3)(D). Again,  
24 Plaintiffs were required to address this issue, but did not. Based on the foregoing, Plaintiffs have  
25 failed to meet their burden under Rule 23(b)(3) to show that class certification is appropriate in  
26 their case. Accordingly, their motion is **DENIED**.

27 However, Plaintiffs indicated that in some respects they were not able to make a proper  
28 showing because Defendant failed to comply with their discovery requests and then sand-bagged

1 them with new evidence presented in the opposition papers. (*See* Pls' Objection to the Decl. of  
2 Charles Johnson Filed in Opp'n to Mot. for Class Certification.) Because it appears that  
3 Plaintiffs were not provided all the requested and necessary information to evaluate their case  
4 prior to class certification, Plaintiffs' motion is denied **WITHOUT PREJUDICE** to renewing it  
5 after they have had an opportunity to obtain and review complete responses to their discovery.

6 The parties' discovery disputes in this regard are **REFERRED** to the Magistrate Judge  
7 pursuant to Federal Rule of Civil Procedure 72(a) and Civil Local Rule 72.1(b). In addition, the  
8 parties shall schedule a case management conference with the Magistrate Judge to establish an  
9 appropriate date when Plaintiffs should file any further motion for class certification.

10 Based on the foregoing, Plaintiffs' motion for class certification is **DENIED WITHOUT**  
11 **PREJUDICE**. The court therefore need not consider at this time Plaintiffs' showing on the  
12 other deficiencies in their initial class certification motion which were noted in the Order.  
13 Defendant's ex parte application for supplemental briefing is **DENIED** as moot.

14 **IT IS SO ORDERED.**

15  
16 DATED: August 10, 2011

17   
18 M. James Lorenz  
United States District Court Judge

19 COPY TO:

20 HON. WILLIAM McCURINE, Jr.  
21 UNITED STATES MAGISTRATE JUDGE

22 ALL PARTIES/COUNSEL  
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